

Honorable John C. Coughenour, Judge

US DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

REPLY S.P.A.,

Plaintiff,

vs.

SENSORIA INC., AND SENSORIA
HOLDINGS LTD., DR DAVIDE VIGANO,
AND MAURIZIO MACAGNO,

Defendants.

Civil Action No. 2:19-cv-00450

DEFENDANTS' MOTION TO
DISMISS UNDER FRCP 12(b) OR FOR
CHANGE OF VENUE

NOTE ON MOTION CALENDAR:
May 17, 2019

**I. DEFENDANTS' MOTION TO DISMISS UNDER FRCP 12(b) OR FOR
CHANGE OF VENUE**

COME NOW Defendants Sensoria Inc. ("Sensoria"), Sensoria Holdings Ltd. ("Sensoria Holdings"), Dr. Davide Vigano ("Vigano"), and Maurizio Macagno ("Macagno"), and pursuant to FRCP 12(b), move this Court for an Order dismissing the claims contained in Plaintiff Reply S.P.A.'s ("Reply's") Verified Complaint (the "Complaint") for want of subject-matter jurisdiction, improper venue and under the doctrine of forum non conveniens. Alternatively, Defendants request the Court enter an Order changing the venue for such claims pursuant to the forum-selection clause contained in the contracts at issue, the aforementioned doctrine of forum

1 non conveniens and 28 U.S.C.S. § 1404(a). Defendants also request an award of attorney's
 2 fees and costs.

3 Defendants base this Motion on the Memorandum appended below and the pleadings of
 4 record in this matter, including the Verified Complaint and all Exhibits thereto.

5 **II. MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER FRCP**
 6 **12(b) OR FOR CHANGE OF VENUE**

7 **INTRODUCTION AND RELIEF REQUESTED**

8 This matter arises from a corporate dispute between Plaintiff, a publicly-traded Italian
 9 corporation, and Defendants, a Delaware corporation and a Nevada limited liability company
 10 and certain of its Directors, involving a Stock Purchase Agreement and two Infragroup Loan
 11 Agreements. See Complaint at Exhibits A, B and C. As set forth below, the Stock Purchase
 12 Agreement contemplates litigating any disputes subject to the laws and jurisdiction of
 13 Delaware. The Infragroup Loan Agreements contemplate litigating any disputes subject to the
 14 laws and jurisdiction of Turin, Italy. Plaintiff's claims all arise under or are derived from those
 15 two sets of contracts. Accordingly, their Complaint should be dismissed for want of subject-
 16 matter jurisdiction, improper forum and forum non conveniens. Alternatively, the venue for
 17 pursuing appropriate claims should be moved to Delaware and Italy pursuant to the contracts at
 18 issue, doctrine of forum non conveniens and 28 U.S.C.S. § 1404(a).
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21 **RELEVANT FACTS**

22 1. Parties.Reply is a publicly-traded Italian corporation with its principal place of
 23 business in Turin, Italy. Complaint at ¶ 1.

24 Sensoria is a U.S. corporation with citizenship in the State of Delaware. Id. at ¶ 2

25 Sensoria Holdings is a U.S. limited liability company with its citizenship in Nevada. Id. at ¶ 3.
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1 Vigano and Macagno are Directors of Sensoria. Id. at ¶¶ 27 and 29.

2 2. Choice of Law and Forum Selection Clause in Stock Purchase Agreement Reply
3 acquired certain Preferred Stock exclusively in Sensoria under the Stock Purchase Agreement
4 dated July 18, 2014 (the “Purchase Agreement”). Id. at Exhibit A.

5 Paragraph 7.1 of that Purchase Agreement is a specific choice of law and forum
6 selection clause under which the Parties agreed: (a) Delaware law governed that Agreement; (b)
7 any action brought under or relating to that Agreement would be filed in Delaware; and (c) that
8 a jury trial was waived. Id. More particularly, that Paragraph specifically provides as follows:

10 7.1 Governing Law. This Agreement shall be governed
11 by and construed under the laws of the State of Delaware in all
12 respects as such laws are applied to agreements among Delaware
13 residents entered into and performed entirely within Delaware.
14 The parties agree that any action brought by either party under or
15 in relation to this Agreement, including without limitation to
16 interpret or enforce any provision of this Agreement, shall be
17 brought in, and each party agrees to and does hereby submit to
18 the jurisdiction and venue of, any state court located in
19 Wilmington, Delaware or any federal court located in the District
20 of Delaware. THE PARTIES TO THIS AGREEMENT
21 HEREBY WAIVE THEIR RIGHT TO A TRIAL BY JURY
22 WITH RESPECT TO DISPUTES ARISING UNDER THIS
23 AGREEMENT AND THE RELATED AGREEMENTS AND
24 CONSENT TO A BENCH TRIAL WITH THE APPROPRIATE
25 JUDGE ACTING AS THE FINDER OF FACT.

26 Id.

27 3. Choice of Law and Forum Selection Clause in Infragroup Loan Agreements.
Reply loaned money exclusively to Sensoria under two Infragroup Financing Contracts
dated March 2, 2016 and October 18, 2016, respectively (the “Infragroup Loan Agreements”).
Id. at Exhibits B and C.

Paragraphs 8.1 and 8.2 of the Infragroup Loan Agreements are identical and specifically

1 contemplated that: (a) Italian law shall govern; and (b) disputes arising from the execution or
 2 interpretation of those Agreements shall be brought in Turin (Italy). More specifically, those
 3 Paragraphs provide as follows:

4 8.1 This Contract is governed by Italian law.

5 8.2 All disputes arising from the execution or
 6 interpretation of this Contract shall be subject to the exclusive
 7 jurisdiction of the Law Courts of Turin, leaving untouched the
 8 entitlement for the Lender alone to have resort to whatsoever other
 judicial authority which may be appropriate.

9 Id.

10 4. Claims Raised in Complaint. Reply's Complaint raises seven causes of action
 11 against Defendants. Counts I (Breach of Contract) and III (Unjust Enrichment) are essentially
 12 identical claims based on alleged nonpayment of the loans pursuant to the Infragroup Loan
 13 Agreements. Counts II (Breach of Contract), IV (Fraudulent Transfer), V (Breach of Fiduciary
 14 Duty), VI (Gross Mismanagement), and VII (Corporate Waste), all arise from the alleged
 15 improper transfer of intellectual property without proper corporate approval required under the
 16 Purchase Agreement. The causes of action brought against the individual Defendants for
 17 Breach of Fiduciary Duty, Gross Mismanagement and Corporate Waste (Counts V, VI and
 18 VII), are all essentially derivative actions brought on behalf of Sensoria.

19 In essence, there are two basic alleged acts giving rise to claims in this action: (a) the
 20 alleged nonpayment of the debt obligation under the Infragroup Loan Agreements; and (b) the
 21 alleged improper transfer of assets without proper authority under the Purchase Agreement. All
 22 the claims other than for Breach of Contract (Counts I and II) flow from the same contractual
 23 obligations, transactional nexus and essential circumstances. Under the express terms of the
 24 Purchase Agreement and Infragroup Loan Agreements, those claims are subject to the laws and
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jurisdiction of the Courts of Delaware and Italy, respectively.

PROCEDURAL BACKGROUND

Plaintiff Reply filed this lawsuit on March 27, 2019.

LEGAL STANDARDS/ARGUMENTS

Defendants seek dismissal of Reply's Complaint pursuant to FRCP 12(b)(1) for lack of subject-matter jurisdiction, FRCP 12(b)(3) for improper venue and pursuant to the doctrine of forum non conveniens. Alternatively, Defendants seek to change venue for such claims to Delaware and Italy as set forth in the contracts at issue and pursuant to the aforementioned doctrine of forum non conveniens and 28 U.S.C.S. § 1404(a).

I. Motion to Dismiss Under FRCP 12(b)(1). Defendants ask the Court to dismiss Plaintiffs' claims for lack of subject-matter jurisdiction under FRCP 12(b)(1) based on the forum selection clauses contained in the Purchase Agreement and Loan Agreement. The Court should grant that Motion for the reasons given below.

a. Standards Under FRCP 12(b)(1). FRCP 12(b)(1) provides that a Defendant, prior to filing an answer, may file a motion to dismiss for want of "subject-matter jurisdiction." The jurisdiction of Federal Courts is restricted to "cases" and "controversies." U.S. Const., Art. III, § 2. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998). The party asserting Federal Court jurisdiction bears burden of demonstrating its existence. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Federal Courts must "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." Renne v. Geary, 501

1 U.S. 312, 316 (1991).

2 Accordingly, here, Reply, as the Plaintiff, has the burden of demonstrating the existence
3 of subject-matter jurisdiction. Furthermore, in considering this Motion, the Court must
4 “presume” it “lack[s]” such “jurisdiction” unless the record clearly shows otherwise.

5 b. Enforcement of Forum-Selection Clauses. Federal Courts apply
6 Federal law to determine the enforceability of forum-selection clauses. Doe I v. AOL, LLC,
7 552 F.3d 1077, 1083 (9th Cir. 2009). Such clauses are “prima facie valid and should be
8 enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the
9 circumstances.” M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). That exception
10 is narrowly-construed. Argueta v. Banco Mexicano, SA, 87 F.3d 320, 325 (9th Cir. 1996). “A
11 forum selection clause is unreasonable if (1) its incorporation into the contract is the result of
12 fraud, undue influence, or overweening bargaining power; (2) the selected forum is so ‘gravely
13 difficult and inconvenient’ that the complaining party will ‘for all practical purposes be
14 deprived of its day in court’; or (3) enforcement of the clause would contravene a strong public
15 policy of the forum in which the suit is brought.” Id. “[T]he party seeking to avoid a forum
16 selection clause bears a ‘heavy burden’ to establish the ground upon which [the Court] will
17 conclude the clause is unenforceable.” Doe I, 552 F.3d at 1083.

18 Here, the Court should enforce the forum-selection clauses contained in Paragraph 7.1
19 of the Purchase Agreement and Paragraph 8.2 of the Infragroup Loan Agreements. Those
20 Paragraphs are “prima facie valid.” Reply bears a “heavy burden” to establish that those
21 Paragraphs are “unreasonable.” Furthermore, there is nothing in the Complaint to even suggest
22 such unreasonableness. Reply literally attached and incorporated by reference the Purchase
23 Agreement and both Infragroup Loan Agreements as Exhibits A, B and C. The first two claims
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1 asserted under the Complaint are based on allegations of breach of those contracts. The
2 remaining causes of action are all ultimately derived from the rights and obligations contained
3 in those Agreements crafted in Italy by an Italian corporation. Nowhere in the Complaint does
4 Reply allege “fraud, undue influence, or overweening of bargaining power.” Nor has Reply
5 made any allegation of grave difficulty or inconvenience that would deprive it of its day in
6 Court. Indeed, Reply is based in Italy. The forum-selection clauses choosing Turin and
7 Delaware impose no significant hardship on Reply. Likewise, there is absolutely no “strong
8 public policy” that has been pleaded that would support disregarding the forum-selection
9 clauses bargained for by the Parties when they entered into the contracts at issue. The Court
10 should grant Defendants’ Motion, enforce the forum-selection clauses contained in Paragraph
11 7.1 of the Purchase Agreement (selecting Delaware as the forum) and Paragraph 8.2 of the
12 Infragroup Loan Agreements (selecting Turin, Italy as the forum) and dismiss Plaintiff’s
13 Complaint accordingly.
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16 2. Motion to Dismiss Under FRCP 12(b)(3)/Forum Non Conveniens. In addition to
17 the basis provided under FRCP 12(b)(1), the Court should dismiss Reply’s Complaint under
18 FRCP 12(b)(3) and pursuant to the doctrine of forum non conveniens because it was brought in
19 the wrong forum despite the clear jurisdictional mandates of Paragraph 7.1 of the Purchase
20 Agreement (submitting to the jurisdiction of the Courts of Delaware) and, especially, Paragraph
21 8.2 of the Infragroup Loan Agreements (submitting to the jurisdiction of the Courts of Turin,
22 Italy).
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24 a. Standards Under FRCP 12(b)(3). Like FRCP 12(b)(1), FRCP
25 12(b)(3) permits a Defendant to file a motion to dismiss for improper venue prior to filing an
26 answer. A Court may dismiss on the basis of FRCP 12(b)(3) where the “venue” is “improper”
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1 or “wrong.” Alt. Marine Constr. Co. v. United States Dist. Court, 571 U.S. 49 (2013).

2 Here, this “venue” is “improper” and “wrong” because Paragraph 8.2 of the Infragroup
3 Loan Agreements selects Turin, Italy as the proper forum and jurisdiction for claims arising
4 under those Agreements. As discussed below, because the Parties selected a foreign
5 jurisdiction, dismissal, rather than mere change of venue, is appropriate. However, it is
6 significant for purposes of this analysis that Reply understandably pleaded broadly and
7 reincorporated every allegation from its Complaint into each successive Count. Accordingly, it
8 is difficult to precisely segregate which claims invoke solely the Delaware forum-selection
9 clause contained in Paragraph 7.1 of the Purchase Agreement and which claims solely invoke
10 the Italian forum-selection clause contained in Paragraph 8.2 of both Infragroup Loan
11 Agreements. Accordingly, what makes sense for purposes of judicial economy is to simply
12 dismiss Reply’s Complaint and Plaintiff can, if it so desires, assert each of its claims in the
13 proper forum selected by the Parties in their various contracts. The Court should dismiss
14 Plaintiff’s Complaint accordingly.

17 b. Dismissal Under Doctrine of Forum Non conveniens. The Court
18 should dismiss Reply’s Complaint pursuant to the doctrine of forum non conveniens. Pursuant
19 to the U.S. Supreme Court’s determination in Alt. Marine, cited supra, “[i]f the designated
20 forum is another federal forum, a transfer-of-venue motion under 28 U.S.C. § 1404(a) is
21 proper...[a]nd if the designated forum is a foreign or state jurisdiction, a motion for forum non
22 conveniens dismissal is the correct way to enforce the clause.” Rachel Kincaid, Foreign
23 Forum-Selection Frustrations: Determining Clause Validity in Federal Diversity Suits, Stanford
24 Journal of Complex Litigation at 133 (Spring 2016)(citing Alt. Marine, 571 U.S. at 60.) As the
25 Supreme Court held in Alt Marine, “the appropriate way to enforce a forum-selection clause
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1 pointing to a state or foreign forum is through the doctrine of forum non conveniens...Section
 2 1404(a) is merely a codification of the doctrine of forum non conveniens for the subset of cases
 3 in which the transferee forum is within the federal court system; in such cases, Congress has
 4 replaced the traditional remedy of outright dismissal with transfer.” 571 U.S. at 60.

5 In Alt. Marine, the Supreme Court went on to analyze and enforce the forum-selection
 6 clause using a forum non conveniens analysis. Id. at 66-68. Because the clause at issue in that
 7 case designated another domestic forum, the Court ultimately held that a change of venue was
 8 appropriate pursuant to 28 U.S.C.S. § 1404(a). Id.

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 10 In so holding, the Court specifically ruled that “when the parties’ contract contains a
 11 valid forum-selection clause, which ‘represents the parties’ agreement as to the most proper
 12 forum...” the Court is not required to give any “weight” to the “plaintiff’s choice of forum,”
 13 nor shall the Court consider “arguments about the parties [sic] private interests” or be bound by
 14 the “original venue’s choice-of-law rules,” including in the consideration of the “public-interest
 15 considerations.” Id. at 62-64. With respect to the “private interest” factor, the Court went on to
 16 specifically hold that “[w]hen parties agree to a forum-selection clause, they waive the right to
 17 challenge the preselected forum as inconvenient or less convenient for themselves or their
 18 witnesses, or for their pursuit of litigation.” Id. at 64. Rather, “[a] court accordingly must
 19 deem the private-interest factors to weigh entirely in favor of the preselected forum.” Id.
 20 “‘Whatever ‘inconvenience’ [the parties] would suffer by being forced to litigate in the
 21 contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting.’”
 22 Id. (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17-18 (1972).)

23
 24 Here, there are valid forum-selection clauses in both the Purchase Agreement and the
 25 Infragroup Loan Agreements. Paragraph 7.1 of the Purchase Agreement contemplates
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1 submitting disputes to the jurisdiction of Delaware Courts. Paragraph 8.2 of the Infragroup
 2 Loan Agreements contemplates submitting disputes to the jurisdiction of the Courts of Turin,
 3 Italy. Again, Reply has understandably pleaded broadly and reincorporated all allegations into
 4 all Counts of its Complaint. Accordingly, it is difficult to meaningfully separate the claims
 5 subject to the jurisdiction of the Delaware Courts from those subject to the jurisdiction of the
 6 Italian Courts. Under Alt. Marine, the Supreme Court has held that forum-selection clauses
 7 should generally be followed and that, where such a clause invokes the jurisdiction of a foreign
 8 Court, the proper remedy is dismissal under the doctrine of forum non conveniens. As set forth
 9 in that decision, the potential inconvenience of litigating in that foreign court is affirmatively
 10 waived through the negotiation and execution of the forum-selection clause. Here, the Parties
 11 negotiated and agreed to litigate certain claims in Delaware and Italy, under the jurisdictions of
 12 those respective Courts and pursuant to their laws. The Court should enforce those provisions
 13 and dismiss Plaintiff's Complaint in accordance with the clear holding of Alt. Marine.

16 3. Common Sense Dictates That Plaintiff's Complaint Should Be Dismissed. Aside
 17 from the clear mandate contained in Alt. Marine, common sense dictates that Reply's
 18 Complaint should be dismissed. It would be an absolute nightmare to try to litigate this matter
 19 in Washington State, applying Delaware law in certain instances and Italian law in others. This
 20 holds particularly true since Plaintiff requested a jury trial. The Court will be required to learn
 21 and instruct the jury on not one, but the laws of two entirely different jurisdictions.
 22 Presumably, the laws of Italy will have to be translated. Even then, they will be subject to
 23 miscomprehension based on linguistic and cultural differences. Not only the jury, but the Court
 24 will have to acquaint itself with two highly-complex areas of law from two completely separate
 25 legal systems. It makes no sense to do that. What does make sense is for the Court to dismiss
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1 this action and for Reply to reconfigure its claims, if it chooses to pursue them, so that it brings
 2 each cause of action in the appropriate venue. The Court should grant Defendants' Motion
 3 accordingly.

4 4. Alternatively, the Court Should Order a Change of Venue to Delaware Under 28
 5 U.S.C.S. § 1404(a). In the alternative to the above, the Court should order a change of
 6 venue to the U.S. District Court for the District of Delaware, at least with respect to any claims
 7 falling under the purview of Paragraph 7.1 of the Purchase Agreement. More specifically, to
 8 the extent it does not dismiss those claims outright as requested above (which it should do), the
 9 Court should order that venue be changed to Delaware as to Counts II (Breach of Contract
 10 relating to the Purchase Agreement), along with the derivative corporate claims contained in
 11 Counts IV (Fraudulent Transfer), V (Breach of Fiduciary Duty), VI (Gross Mismanagement),
 12 and VII (Corporate Waste). In such an event, the remaining Counts I (Breach of Contract
 13 relating to the Infragroup Loan Agreements) and III (Unjust Enrichment arising from the loans
 14 that are the subject matter of those Infragroup Loan Agreements) should still be dismissed as
 15 set forth in the preceding sections.
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18 28 U.S.C.S. § 1404(a) generally provides that “for the convenience of parties and
 19 witnesses, in the interest of justice, a district court may transfer any civil action to any other
 20 district or division where it might have been brought or to any district or division to which all
 21 parties have consented.”
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23 As the U.S. Supreme Court held in Alt. Marine, 28 U.S.C.S. § 1404(a) applies the
 24 “doctrine of forum non conveniens” to the “subset of cases in which the transferee forum is
 25 within the federal court system,” supporting “transfer” over “outright dismissal.” 571 U.S. at
 26 60.
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1 Here, if the Court does not dismiss the claims arising in relation to the Purchase
 2 Agreement outright, it should order that venue be changed to the U.S. District Court for the
 3 State of Delaware under 28 U.S.C.S. § 1404(a) and in accordance with Paragraph 7.1 of that
 4 Purchase Agreement.

5 5. Attorney's Fees and Costs. The Court should award Defendants their
 6 reasonable attorney's fees and costs pursuant to the Purchase Agreement and Infragroup Loan
 7 Agreements.
 8

9 CONCLUSION

10 Based on the foregoing, the Court should enter an Order dismissing Reply's Complaint
 11 pursuant to FRCP 12(b)(1), FRCP 12(b)(3) and the doctrine of forum non conveniens based on
 12 the forum-selection clauses contained in the contracts at issue. Alternatively, the Court should
 13 dismiss those claims arising from the Infragroup Loan Agreements, which contain a forum-
 14 selection clause vesting jurisdiction in Italy, and change the venue for those causes of action
 15 arising from the Purchase Agreement, which contains a forum-selection clause vesting
 16 jurisdiction in Delaware. The Court should also award Defendants' their attorney's fees and
 17 costs.
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19 DATED this 18th day of April 2019.

20 By: 
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22 **Patrick L. Vail**, WSBA 34513
 23 Attorney for Defendants
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 25
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Honorable John C. Coughenour, Judge

US DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

REPLY S.P.A.,

Plaintiff,

vs.

SENSORIA INC., AND SENSORIA
HOLDINGS LTD., DR DAVIDE VIGADO,
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Defendants.

Civil Action No. 2:19-cv-00450

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS UNDER FRCP
12(b)

[PROPOSED]

(Clerk's Action Required)

ORDER GRANTING DEFENDANTS' MOTION
TO DISMISS UNDER FRCP 12(b)

This matter came on regularly for hearing before the Court before the Honorable John C. Coughenour, Judge on Defendants' Motion to Dismiss Under FRCP 12(b) or Change Venue, and the Court, having review the Motion, along with the Verified Complaint and all Exhibit thereto, and having considered any Response and Reply Memoranda filed by the Parties in support of and opposition to said Motion, and having reviewed the records of this case, and being otherwise advised on the bases for the aforementioned Motion,

NOW THEREFORE,

THE COURT ORDERS, FINDS AND DECREES AS FOLLOWS:

1. The Court GRANTS Defendants' Motion to Dismiss Under FRCP 12(b);
2. The Court FINDS that it lacks subject-matter jurisdiction and that the doctrine of forum non conveniens and the forum-selection clauses contained in the Purchase Agreement and Loan Agreements attached as Exhibits A, B and C to the Verified Complaint require dismissal of all claims, causes of action and counts contained in said Complaint;
3. The Court ORDERS that Plaintiff's Verified Complaint and all claims, causes of action and counts contained therein are hereby dismissed without prejudice;
4. The Court ORDERS that Defendants shall have a judgment against Reply S.P.A. in the amount of \$_____ for their reasonable attorney's fees and costs under the Purchase Agreement and Loan Agreements attached as Exhibits A, B and C to the Verified Complaint; and
5. _____
_____.

SIGNED this ____ day of _____ 2019.

Honorable John C. Coughenour, Judge

1 Presented by:

2 PATRICK L. VAIL, PLLC

3
4 By: /s/ _____

Patrick L. Vail, WSBA 34513

5 Attorney for Defendants

6 Copy received, approved as to form, notice of presentation waived:

7 Presented by:

8 LANE POWELL PC

9
10 By: _____

Barbara Duffy, WSBA _____

Jessica N. Walder, WSBA _____

12 Attorney for Plaintiff

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ORDER

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